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No. 370

In the Supreme Court of the United States

OCTOBER TERM, 1930

J. W. ALFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	3
Conclusion	11

CASES CITED

Bain, Ex parte, 121 U. S. 1	4
Benham v. *United States*, 13 F. (2d) 558, certiorari denied, 273 U. S. 721	6
Blitz v. *United States*, 153 U. S. 308	6
Salinger v. *United States*, 272 U. S. 542	5
Seaboard Air Line v. *Padgett*, 236 U. S. 668	11
Silkworth v. *United States*, 272 U. S. 542, certiorari denied, 271 U. S. 664	5
Sugarman v. *United States*, 249 U. S. 182	9

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OPINION BELOW

The charge of the trial court appears at R. 379–398. The majority opinion of the Circuit Court of Appeals (R. 492), and the dissenting opinion (R. 503), are reported in 41 F. (2d) 157.

JURISDICTION

The judgment sought to be reviewed was entered on May 26, 1930. (R. 506.) A petition for rehearing was denied on June 26, 1930. (R. 507.) The petition for certiorari was filed on August 21, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in the trial of an indictment for using the mails to defraud, the scheme to defraud, as charged in the indictment, was sufficiently proved when the court withdrew from the jury all evidence relative to certain allegations of the indictment.

2. Whether reversible error was committed in denying the petitioner's counsel the right to inquire of a witness on cross-examination as to his "address and place of residence."

3. Whether reversible error was committed in refusing to give to the jury a requested instruction to the effect that there must be evidence to establish the fact that the defendant knew at the time of making promises that they would not be fulfilled, when, as the Government contends, this point was fully covered elsewhere in the charge.

4. Whether the court erred in instructing the jury that if the petitioner made false representations as to his ownership of land, "a subsequent ultimate intent to reimburse the investor or investors would by no means furnish a condonation or legal excuse for the false representations."

STATEMENT

The petitioner was convicted in the United States District Court for the Southern District of California under an indictment (R. 3) charging him with using the mails in furtherance of a scheme to defraud. The scheme which the indictment charged consisted in selling to the public parcels of land

which the petitioner did not own, with the representation that he would spend $300,000 in drilling oil wells upon the entire parcel, the fruits of which would inure to the purchasers.

The District Court imposed sentences aggregating five years imprisonment and fines of $2,000. (R. 70–71.) Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit, and that court, with one judge dissenting, affirmed the judgment of the court below. (R. 506.)

ARGUMENT

I

One of the plans set forth in the indictment related to a so-called "Ten-Way-To-Win-Syndicate." After the Government's evidence as to this part of the scheme was all in, the petitioner moved to strike it out because this evidence did not show that the "Ten-Way-To-Win-Syndicate" was a part of the original scheme. The court at that time overruled the motion. (R. 133–134.) Later on the court reversed its ruling and ordered the testimony excluded, and in so doing said (R. 148):

> After a more thorough and careful examination of the indictment in this case, I have decided to change my ruling on defendant's motion to exclude all testimony with reference to the Ten-Way-To-Win-Syndicate. The motion will be sustained, and all testimony of Mr. Brubaker and any other testimony that may have been offered and admitted in that connection will be excluded,

> and the jury will not consider it for any purpose. That testimony, in my judgment, is certainly not admissible on the direct examination; whether it will be in rebuttal is a matter that I do not know and pass upon. That testimony might possibly be admissible as tending to show the means by which the alleged original scheme was carried out, but the indictment alleges that it was a part of the alleged original scheme, while the testimony, in my judgment, does not so show. So you may, at least during the direct examination, bear that in mind in offering your testimony.

It is the contention of the petitioner that in the trial of a case involving the use of the mails to defraud, it is incumbent upon the Government to prove the scheme to defraud precisely as laid in the indictment, and that the action of the trial court described above amounted to an amendment of the indictment without the action of a grand jury.

We submit that the trial court did not amend or alter the indictment as in *Ex parte Bain*, 121 U. S. 1, upon which the petitioner relies, but merely ruled that there was a failure of proof as to a portion of the allegations of the indictment. This action was taken at the instance of the petitioner, not the Government. The indictment set forth other plans, and conviction under it did not require proof of every plan which it mentioned. The action of the trial court finds ample support in

the decision of this Court in the analogous case of *Salinger* v. *United States*, 272 U. S. 542, where it was said (p. 548):

> The contention that the court, by withdrawing from the jury a part of the charge as without support in the evidence, amended the indictment and thereby prevented it from longer serving as an accusation by a grand jury is on no better plane than the others. The indictment was not amended, either actually or in legal effect. It remained just as it was returned by the grand jury, and the trial was on the charge preferred in it and not on a modified charge. * * * The scheme to defraud as set forth in the indictment was manifold in that it comprehended several relatively distinct plans for fleecing intended victims. What the court withdrew from the jury was all of these plans but one. Thus the court ruled that the evidence while tending to sustain the charge as respects one of the plans did not give it any support as respects the others. Whether this was right or wrong—as to which we intimate no opinion—it did not work an amendment of the indictment and was not even remotely an infraction of the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." * * *

Further support for the decision below is found in *Silkworth* v. *United States*, 10 F. (2d) 711,

714–715 (C. C. A. 2nd), in which this Court refused certiorari. 271 U. S. 664. See also *Benham* v. *United States*, 13 F. (2d) 558, 561 (C. C. A. 6th), certiorari denied, 273 U. S. 721.

II

It is next asserted that the trial court erred in refusing to permit a witness on cross-examination to be interrogated as to where he lived. In claiming the right to have the witness answer, counsel for petitioner at the trial said (R. 194):

> Why, I think the jury has a perfect right to know who the witness is, where he lives and what his business is, and we have the right to elicit that on cross-examination. I may say that this is the first witness the Government has called that they have not elicited the address from.

Later, upon further argument of the matter, counsel for petitioner stated that "it is my impression, that he [the witness] is here in the custody of the Federal authorities. If that is so, I have a right to show that for the purpose of showing whatever bias or prejudice he may have." (R. 198.)

Although we question the correctness of the ruling, it would hardly seem to constitute reversible error, as it is not shown that prejudice resulted. To a considerable extent the bounds of such cross-examination must be left to the discretion of the court. *Blitz* v. *United States*, 153 U. S. 308, 312.

The majority of the Circuit Court of Appeals below thus disposed of the point (R. 499, 500):

> The purpose of such evidence is to identify the witness and to some extent give proper background for the interpretation of his testimony. In this case, however, the counsel indicated his purpose to use the information for the purpose of discrediting the witness. It is part of the obligation of a trial judge to protect witnesses against evidence tending to discredit the witness unless such evidence is reasonably called for by exigencies of the case. A witness is not on trial and has no means of protecting himself. Here it was evident that the counsel for the appellant desired to discredit the witness, without so far as is shown, in any way connecting the expected answer with a matter on trial. If it had been contended that the witness was in custody because of his participation in the transaction with which the appellant was charged, and if it was sought to show that he was testifying under some promise of immunity, it would undoubtedly have been prejudicial error to have excluded such testimony, but counsel avowed no such purpose, and indicated that the proposed question was merely in pursuit of a fishing expedition by which he hoped to discredit the witness. The witness was examined at great length concerning his relation to the appellant and great latitude was accorded in that examination.

III

The petitioner next contends that the court erred in refusing to give to the jury a requested instruction, No. 10 (R. 401), to the effect that there must be evidence to establish the fact that the defendant knew at the time of making promises that they would not be fulfilled.

The Court's refusal was thus stated (R. 402):

> Refused. Substantially contained in general and requested instructions. Repetition.

The portions of the charge as given, appearing at pages 382, 385, 387–392 of the Record, make it plain that the substance of the requested instruction was given. The following part of the charge is typical (R. 382):

> In this case the intention of the defendant is the very gist and substance of the fraud which must necessarily be embodied in the scheme or artifice as a foundation for the violation of the law. Without such fraudulent intention it would be impossible to devise a scheme or artifice to defraud.

The majority of the Circuit Court of Appeals thus disposed of the point (R. 502):

> As to instruction No. 10 referred to on page 72 of appellant's brief, the court did give substantially this instruction. The requested instruction states that the evidence must establish the fact that the defendant knew at the time of making such promise or representation that it would not be fulfilled, whereas the court properly instructed the

> jury that, if when the promise was made the defendant had no intention of performing, such promise was fraudulent.

See also *Sugarman v. United States*, 249 U. S. 182, 185.

IV

Petitioner's final complaint attacks that part of the charge to the jury which states, in substance, that if petitioner "did make false and fraudulent representations and assurances for the purpose of deceiving persons with respect to his ownership of the land * * * then a subsequent ultimate intent to reimburse the investor or investors would by no means furnish a condonation or legal excuse for the false representations." (R. 386.) The petitioner's counsel objected to this instruction on the ground that the indictment contained no allegations that misrepresentation as to the ownership of the land was a part of the scheme to defraud.

The majority of the Circuit Court of Appeals below thus disposed of the point (R. 502–503):

> "The court also instructed the jury that if the defendant devised the scheme set forth in the indictment and made false and fraudulent representations for the purpose of deceiving persons with respect to his ownership of the land in Cimarron County, Oklahoma, etc., a subsequent ultimate intent to reimburse the investors by no means furnished a condonation or legal excuse for false representations, but such fact could be considered by the jury in determining

whether there was an intent to defraud. Appellant complains of this instruction on the ground that it is not alleged in the indictment that the appellant misrepresented his title. This statement concerning the indictment is true but the court elsewhere instructed over and over that it was necessary to prove the allegation of the indictment beyond a reasonable doubt in order to convict the appellant. The allegations in the indictment concerning title were quoted in the instruction. The jury were therefore properly instructed as to what proof was necessary to substantiate the charge in the indictment. The instruction with reference to misrepresentation concerning title was for the purpose of informing the jury that an ultimate intent to repair the fraud would not excuse fraud. That this instruction incorrectly assumed that there was an affirmative charge of misrepresentation as to title, is, in the light of this fact, not significant.

While it is true, as stated by the Circuit Court of Appeals, that the indictment did not charge the making directly of false representations with respect to the ownership of the land, the indictment did contain the following allegation (R. 4):

> It was further a part of said scheme and artifice that the defendant would not exercise the option to purchase any of the land hereinbefore described nor to obtain title to any part thereof.
>
> It was further a part of said scheme and artifice that the defendant should and he did,

without having title thereto, sell and offer for sale parcels and tracts of land from and out of the tract of land hereinbefore described and to which he had an option as aforesaid.

There is, therefore, at least an implication of ownership in the sales made.

Petitioner, as a witness in his own behalf, was examined at length regarding his alleged title to the property involved (R. 298 *et seq.*), and there was testimony of subsequent refunding and transferring purchasers to other projects (R. 158, 167–168, 175, 181, 182). We submit that in view of other portions of the charge the jury could not have been misled. *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 672.

CONCLUSION

Petitioner raises no question of merit deserving of review on certiorari, and his petition should therefore be denied.

Respectfully submitted.

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